Comptroller General
of the United States

Washington, D.C. 20548

916178

Decision

Matter of: Hines/Mortenson

File: B-256543.4

Date: August 10, 1994

Joseph D. West, Esq., Susan B. Cassidy, Esq., and Michael E. Lackey, Esq., Arnold & Porter, for the protester.
Bruce I. Selfon, Esq., and Edward V. Gregorowicz, Jr., Esq., Cotten & Selfon, for BPT Courthouse Associates, Limited Partnership, an interested party.
Amy J. Brown, Esq., General Services Administration, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly considered Phase I evaluation results during Phase II of a two-phase negotiated procurement is denied where record shows that solicitation contemplated evaluation of all considerations throughout acquisition, and protester was repeatedly notified during Phase II discussions of agency's continuing concern with protester's inability to meet Phase I requirements.

2. Protest that agency improperly downgraded protester's proposal and upgraded awardee's under two evaluation criteria during Phase II of acquisition is denied where record shows that changes in evaluation results were based either on proposal changes or on a reassessment by the evaluators of the relative merits of proposals. In addition, changes in scoring were not prejudicial to protester whose proposal was seriously deficient in other areas.

3. Protest that agency failed to make proper cost/technical tradeoff is denied where record shows that agency carefully considered all evaluation criteria and the comparative benefits of each proposal in making its source selection.

4. Protest that agency violated Antideficiency Act in awarding contract is dismissed as untimely where allegation is first raised after protester's receipt of agency report; since appropriations statutes are a matter of public record,

protester knew or should have known of basis for protest within 10 working days of agency's award decision.

DECISION

Hines/Mortenson, Joint Venture protests the award of a contract to BPT Courthouse Associates, Limited Partnership under request for proposals (RFP) No. GS-05P-93-GBC-0004, issued by the General Services Administration (GSA) for design and construction services. Hines makes numerous arguments concerning the evaluation of offers and the award decision. Hines also argues that GSA violated the Antideficiency Act, 31 U.S.C. § 1341 (1988), in awarding the contract.

We deny the protest in part and dismiss it in part.

BACKGROUND

The RFP called for fixed-price offers to design and build a federal courthouse and office building in Minneapolis, Minnesota. The acquisition was structured as a two-phase negotiated procurement; award was to be made to the firm whose proposal represented the best overall value to the government, technical considerations being more important than price.

During Phase I, firms' proposals were evaluated initially on a "go, no-go" basis to determine whether they met various minimum requirements relating primarily to experience with projects of the type and magnitude contemplated by the solicitation. Those firms found to meet the minimum requirements were then evaluated on the basis of three technical evaluation criteria (weighted on a 100-point scale): Offeror Qualifications (50 percent); Management Plan (30 percent); and Design Concept (20 percent). After seeking minor clarifications from the offerors and determining which firms met the "go, no-go" criteria, GSA reviewed proposals based on the Phase I evaluation criteria. Hines's proposal, and the proposals of three other firms including BPT, were determined to be within the competitive range after this evaluation.[1] These four firms were then asked to submit Phase II proposals.

As part of its request for Phase II proposals, GSA provided each offeror with detailed written discussion questions, and met with each firm twice prior to the deadline for

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[1]Hines submitted two alternate designs with its initial proposal. Only one of these designs was determined to be within the competitive range.

submission of Phase II proposals. The first round of meetings was to provide the offerors an opportunity to ask questions about the agency's written discussion questions. The second round was to provide offerors an opportunity to make oral presentations of any design changes. After these two meetings, the firms submitted initial Phase II proposals.

Under Phase II, the technical evaluation criteria (and relative weights) were as follows: Design Excellence (65 percent); Management Plan (20 percent); and Qualifications (15 percent). After evaluating the initial Phase II proposals, GSA again prepared detailed written discussion questions for each offeror, and held two more rounds of face-to-face meetings. As with the Phase I meetings, the first of these meetings was an opportunity for offerors to discuss the agency's concerns as outlined in the written discussion questions, and the second was an opportunity for firms to make oral presentations.[2] At the conclusion of these meetings, GSA telephonically conducted yet another round of oral discussions to reemphasize various concerns. At the close of the Phase II negotiations, GSA solicited and received best and final offers (BAFO); included with the agency's BAFO request letters were a final group of written discussion questions.

After reviewing the BAFOs, GSA found that all of the firms had deviated from the RFP requirements in ways that were unacceptable to the agency. (The RFP permitted deviations, provided that the deviations were of equal or greater value when compared to the requirements of the solicitation. The offerors' BAFO deviations, in GSA's view, were solely cost savings measures that did not meet the RFP requirements and were not of an equal or greater value.) GSA therefore issued an amendment to the RFP reemphasizing and clarifying its intent with regard to allowing deviations, and solicited revised BAFOs. After reviewing the revised BAFOs, GSA concluded that all remaining deviations were acceptable, and did not alter the agency's initial BAFO evaluation results.

Based on its review of BAFOs, GSA found that BPT's proposal offered the best overall value to the government; it received the highest technical rating among the competitive range firms and had the second-lowest price. Hines had the lowest technical score and the lowest price. GSA made award to BPT and Hines's protest followed.

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[2]During the second meeting, Hines presented two additional design concepts to the agency that had not previously been submitted. Hines submitted one of these two designs as an alternate offer with its BAFO, but the agency was unable to evaluate the alternate design because it was incomplete.

DESIGN EVALUATION

Hines first argues that GSA improperly evaluated proposals in the Design area. Hines alleges that the RFP contained different evaluation considerations for Phase I and Phase II, and that award was to be based only on the Phase II considerations. In support of its position, Hines points out that the RFP called for consideration of the offerors' "design concept" during Phase I, as opposed to the firms' "design excellence" during Phase II. Hines maintains that "design concept" refers to the offeror's vision for the building's image and character, whereas "design excellence" refers to the "nuts and bolts" of the proposed buildings such as building systems and energy efficiency. Hines contends that the agency improperly considered its Phase I weaknesses during the Phase II evaluation and source selection; more specifically, Hines maintains that GSA improperly considered its building's exterior image and character during Phase II.

This protest basis is without merit for two reasons. First, a reading of the RFP does not support Hines's view. A solicitation must be read as a whole, and in a manner that gives effect to all of its provisions. See State Technical Inst. at Memphis, B-250195.2; B-250195.3, Jan. 15, 1993, 93-1 CPD ¶ 47. In this case, we think that the RFP, when read as a whole, reasonably contemplated continuing consideration of the offerors' design concepts throughout the acquisition.

In this regard, the primary provision of the RFP defining the agency's design requirements was a section called "Design Goals and Objectives." That section contains a listing of some 23 goals and objectives (defined in greater detail elsewhere) which describe various aspects of GSA's broad requirements such as seismic safety, urban response, building image and character, and security requirements. That section states "design goals and objectives shall be the basis for the offeror's proposals and submittals. They include, but are not limited to key issues to be resolved by the offeror." In our view, this section, when fairly read, provides for consideration of the design goals and objectives throughout the acquisition, since the section outlines the "key issues" to be resolved by the offerors through their proposals. In short, the object of the acquisition was to resolve the design goals and objectives through the proposal submission process.

This interpretation is confirmed by a reading of the Phase II Design Excellence criterion. Contrary to Hines's position, the Phase II Design Excellence criterion was not limited to consideration of the mechanics of the offerers' buildings. In addition to stating that consideration would

be given to matters such as equipment and building systems, the Design Excellence criterion also stated that consideration would be given to "architectural design excellence," "building features," "design details," and "attention to other project requirements presented in this RFP." These RFP provisions, when read as a whole, clearly put offerors on notice that the design goals and objectives (including such things as the building's exterior image and character) would be considered throughout the acquisition, and not just during Phase I.

Further, even if Hines's interpretation of the RFP is correct, GSA adequately conveyed its intent to consider the firm's exterior image and character during Phase II through numerous rounds of discussions. While an agency ordinarily should issue an amendment to a solicitation where its requirements or evaluation scheme change, it may nonetheless properly discharge its duty to apprise offerors of a change in its requirements or the basis for evaluation through appropriate discussions. Simmonds Precision Prods., Inc., B-244559.3, June 23, 1993, 93-1 CPD ¶ 483.

Here, the record shows that during each of the many rounds of oral and written discussions, Hines was queried in detail regarding the exterior image and character of its proposed building. For example, the agency's initial discussion letter to Hines during Phase II identified the firm's design image and character as a deficiency and stated:

> "There are major concerns regarding image and character, (i.e. the expressive qualities of the building). The exterior images presented do not portray an appropriate aesthetic vision for the courts. [Hines's] proposal, although functionally competent and substantively changed from the Phase I submission, falls short of the image and character envisioned by the Courts and required by the RFP."

These concerns were repeatedly brought to Hines's attention during the Phase II oral negotiations, and the record shows that at one point the firm actually considered withdrawing from the competition because of its inability to resolve GSA's concerns in this area. The agency's BAFO request to Hines again reiterated this central concern:

> "There remain . . . serious concerns regarding the design progress that the [Hines team] has shown. Numerous submissions and approaches to date have failed to give a clear indication of the design intent or how the [Hines] vision for the project will be realized. Further development in the areas discussed in the government's written

> comments, during telephone conversations, and at the oral presentation is expected."

The record is thus clear that Hines was well aware of GSA's concerns regarding its proposal in this area, and that GSA was considering the firm's exterior image and character throughout Phase II. We conclude that Hines was fully apprised of the agency's intentions regarding the design evaluation and that the evaluation was unobjectionable.[3]

MANAGEMENT AND QUALIFICATIONS EVALUATION

Hines argues that the agency improperly changed the scoring for the Hines and BPT proposals between Phase I and Phase II under the Management and Qualifications evaluation criteria, even though there were no significant changes between Phase I and Phase II in the evaluation criteria for these two areas or the proposals.

We have no basis to question the agency's change in scoring under these two criteria. In considering allegations relating to the propriety of an agency's technical evaluation, our Office will not independently reevaluate proposals; our review is limited to considering whether the evaluation results are reasonable and consistent with the evaluation criteria found in the solicitation. Aumann, Inc., B-251585.2; B-251585.3, May 28, 1993, 93-1 CPD ¶ 423. Agencies may properly rescore proposals where it is necessary to correct errors, misconceptions, or inconsistencies with the evaluation criteria; the question in such circumstances is whether the rescoring was reasonable and consistent with the evaluation criteria. Id.

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[3]Hines also argues that, to the extent that the agency properly could review Phase I evaluation considerations during Phase II, it improperly failed to consider the City of Minneapolis' concerns with BPT's proposed design. (Hines maintains that the city's design goals were part of the Phase I evaluation.) We disagree. The record shows that GSA carefully reviewed the City's comments during all phases of the acquisition. Due to a failure on the part of the City's technical advisors to engage in a systematic and thorough review of proposals during Phase II, GSA ultimately discounted the results of their evaluation. In any event, the agency's final consensus evaluation report shows that the City's major concern (the adequacy of BPT's plaza design) was carefully considered by the source selection evaluation board (SSEB) during the course of its deliberations over which firm to recommend for award. The adequacy of BPT's plaza design is noted as a weakness in the final consensus report, but one that could easily be resolved during performance.

Here, the record shows that the evaluators' revisions were in some instances based upon changes to the proposals (contrary to Hines's position), and in some instances based on changes in the views of the evaluators. For example, in the Management area, the evaluators found that BPT had made revisions to its management plan during discussions and these revisions showed that the firm had a comprehensive understanding of the project, while in the Qualifications area, one of the evaluators reduced Hines's score based not on a significant change to the firm's proposal but rather on a change in his perception of the firm as it evolved during the discussion process; this evaluator found that Hines's lack of design leadership during the acquisition suggested that Hines was "significantly less qualified. . . than the consensus evaluation that was initially found by the [evaluation] Board." Rescoring is permissible in these circumstances Moreover, Hines has not shown that the final evaluation results do not accurately reflect the relative merits of the proposals.

In any case, the overall effect of the change in the firms' scores was not prejudicial to Hines. Prejudice is an essential element of every viable protest, and we will not disturb an agency's award decision even where the record reflects some minor error in the evaluation of proposals, so long as the error does not render the evaluation results unreasonable or prejudicially affect the protester. Mesa, Inc., B-254730, Jan. 10, 1994, 94-1 CPD ¶ 62.

The record shows that BPT's technical score for its BAFO was 77.75 out of a possible 100 points, while Hines received only 43 points. While the record does show that Hines's score was lowered in these areas from Phase I to Phase II while BPT's was raised, the overall change was negligible. Using the firms' Phase I scores--which the protester does not challenge as improper-- Hines's overall BAFO score would only improve by 7.2 points while BPT's score would only be reduced by 4.75 points. Thus, Hines's final evaluation score would only have been 50.2 points, whereas BPT's score would have been 72.5. Given the significant disparity between the two firms--based primarily on GSA's concern with the quality of Hines's design--we have no basis to conclude that the allegedly improper scoring in these areas materially affected GSA's source selection.[4]

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[4]Hines also argues that the agency improperly downgraded it twice for its design deficiencies; once under the Design criterion and again under the Qualifications criterion. We disagree. The record shows that Hines was criticized in the Qualifications area for its design team's lack of leadership

(continued...)

COST/TECHNICAL TRADEOFF

Hines argues that GSA failed to conduct a proper cost/technical tradeoff because it failed to analyze the various cost elements contained in the offers. According to the protester, an examination of the offers in terms of "hard costs" (direct construction costs) versus "soft costs" (design fees, overhead and profit) shows that, as between its offer and BPT's, it proposed higher hard costs and lower soft costs. Hines maintains that the SSEB's final consensus report fails to compare the offers in these terms. Hines also argues that the source selection decision is flawed because the source selection authority (SSA) was not provided with all relevant information relating to the proposals. In this regard, Hines contends that the final consensus report of the SSEB fails to convey the necessary cost breakdown information.[5] Hines maintains that, because this acquisition was conducted using formal source selection procedures, the SSA was required to consider such cost breakdowns in its cost/technical tradeoff.

Unless otherwise prohibited by the RFP, agencies may properly make award to other than the low-priced firm in a negotiated procurement; agencies may make cost/technical tradeoffs, and such tradeoffs are governed only by the test of rationality and consistency with the RFP's evaluation criteria. Ameriko Maintenance Co., B-253274; B-253274.2, Aug. 25, 1993, 93-2 CPD ¶ 121. In addition, when an agency is engaged in formal source selection procedures, the SSA is required to arrive at his or her award decision based on the evaluation factors established in the RFP, and must consider the rankings and ratings of the competing firms. The ultimate source selection document must reflect the bases and reasons for the award decision. Federal Acquisition Regulation (FAR) § 15.612.

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[4](...continued)
and vision, and its failure to produce a concept that appropriately responded to the RFP requirements. In our view, GSA could properly have downgraded Hines under the Qualifications criterion for the shortcomings of the design team's effort. Under the Qualifications criterion, the agency's evaluation considered not only the firms' "design and construction experience," but also "the performance of the offeror's team. . . . "

[5]Hines also contends that the SSEB consensus report cannot serve as a reasonable basis for the source selection decision because it fails to acknowledge the flaws in the evaluation of technical proposals identified by Hines. As already discussed, however, we have no basis to object to the agency's technical evaluation.

We have no basis to object to GSA's cost/technical tradeoff. As for whether the SSEB considered the pricing structure of the various offers, the record contains price analysis worksheets prepared both during the initial stages of the acquisition and also after receipt of BAFOs. These pricing worksheets reflect a detailed analysis of each offeror's price proposal, and include a breakdown of costs between the numerous cost categories referred to by Hines. The post-BAFO worksheet also recognizes the relative differences between the BPT proposal and those of the other offerors in terms of hard versus soft costs. The SSEB's final consensus report specifically states that the SSEB reviewed the detailed price breakdown worksheets described above. The report also reflects the SSEB's conclusion that the added cost premium associated with the BPT proposal was being paid, in part, because of the firm's superior design. This, in our view, amounts to an acknowledgment of the fact that BPT had higher soft costs, but that these higher soft costs were warranted in light of the firm's superior design.

We also have no basis to object to the SSA's award decision based on the materials presented to him. The SSEB's final consensus report contains a detailed analysis of the strengths and weaknesses of each offer in light of the technical and price evaluation factors contained in the RFP. In addition, the report presents an in-depth comparison of the offers to one another, and states the reasons why, in the SSEB's view, BPT's offer was worth the additional cost premium associated with it. As already noted, the primary basis for the SSEB's preference related to the superiority of BPT's design. The SSEB also noted that BPT's proposal was superior in other areas as well, including uniformity of the judicial chambers, adequacy of the facility's security, larger plaza size, efficient floor plates, and enhanced flexibility for meeting future growth requirements. In contrast, numerous weaknesses were associated with the Hines proposal, and the SSEB final consensus report concludes that the cost savings represented by Hines's offer would not offset its technical deficiencies.

In our view, the SSEB's final source selection report reflects a careful consideration of all of the elements outlined in FAR § 15.612; each of the solicitation's evaluation and award criteria are fully discussed, and the basis for the agency's ultimate award decision is adequately explained. There thus is no basis to find that the SSA, in basing his decision on this document, acted improperly or in violation of the formal source selection procedures.

ANTIDEFICIENCY ACT VIOLATION

Finally, Hines argues that GSA violated the Antideficiency Act, 31 U.S.C. § 1341 (1988), in awarding this contract.

Among other things, the Antideficiency Act prohibits officers and employees of the federal government from obligating funds in violation of the statute appropriating the funds. According to Hines, GSA failed to award a contract before the funds provided for this project expired.

Two appropriation acts provide funds for this project--Pub. L. No. 101-509, 104 Stat. 1389, 1406 (1990) and Pub. L. No. 102-141, 105 Stat. 834, 850 (1991). The first act (Pub. L. No. 101-509) required GSA to obligate the funds appropriated by September 30, 1992, while the second (Pub. L. No. 102-141) required that the funds appropriated be obligated by September 30, 1993. Failure to obligate funds by the indicated dates would result in their expiration for purposes of the particular project specified in the act and their reversion to the Public Buildings Fund. Both statutes provided, however, that the funds would not revert to the Public Buildings Fund if, by these dates, funds for the design or other work on the project had been obligated. The record shows that GSA awarded two other contracts--one for the conduct of an environmental impact study and another for the performance of some of the initial design requirements for the project--prior to September 30, 1992.

In any event, this allegation is untimely because Hines did not raise the matter until it filed its comments responding to the agency report.[6] The appropriations statutes providing funding for this project contained specific line-item appropriations for the Minneapolis project. These statutes were a matter of public record. Since there were no other statutes appropriating the necessary funds for this project, Hines knew or should have known that GSA intended to fund this project from monies appropriated by those statutes. Consequently, any allegation based on Hines's view that the award of a contract using those funds would be improper should have been filed within 10 working days of

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[6]Hines requests that we consider this allegation under the significant issue exception to our timeliness requirements. 4 C.F.R. § 21.2(c) (1994). We decline to do so. In order to prevent the timeliness requirements of our Bid Protest Regulations from becoming meaningless, we will invoke the significant issue exception only where the protest raises an issue of widespread interest to the procurement community that has not previously been addressed on the merits by our Office. Dash Eng'g, Inc.; Engineered Fabrics Corp., B-246304.8; B-246304.9, May 4, 1993, 93-1 CPD ¶ 363. Our Office regularly addresses the merits of timely Anti-Deficiency Act allegations. Id.; El Paso Elec. Co., B-254479, Dec. 22, 1993, 93-2 CPD ¶ 335. Consequently, we cannot say that Hines's allegation meets this standard.

when GSA awarded the contract. Since Hines did not raise this issue until more than 10 working days after GSA awarded the contract to BPT, its protest on these grounds is untimely. 4 C.F.R. § 21.2.

The protest is denied in part and dismissed in part.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel